Ontario

A FACT SHEET

Office of the
Public Guardian
and Trustee

Substitute Decisions Act

The *Substitute Decisions Act* is an important law that advances and protects the rights and well being of individuals, particularly those who are vulnerable in financial, health and personal care matters.

THE LAW

Q1. Why do we need this law?

The Act, which came into effect April 3, 1995, and was amended on March 29, 1996, pulls together a number of rules and procedures that were previously covered in several different pieces of legislation. The Act includes clear definitions, guidelines and safeguards. Generally, the Act is designed to:

- respect people's choices by giving them the opportunity of appointing someone in advance to make decisions about their finances and personal care if they eventually become unable to make those decisions themselves;
- recognize the important roles of families and friends in making decisions for loved ones;
- provide less costly options for families to get legal authority to make decisions if a loved one becomes mentally incapable;
- clarify the rights of adults who are believed to be mentally incapable;
- limit public guardianship and other government intervention to situations where there are no other suitable alternatives,
- clarify the rights and responsibilities of substitute decision makers.

Q2. Who benefits from this legislation?

Everyone in Ontario, including people who:

- want to make sure their wishes are followed should they become unable to make decisions;
- are assessed as being mentally incapable of making their own decisions;
- make treatment decisions for themselves or others;
- are families, caregivers and friends.

POWERS OF ATTORNEY

Q1. What is a power of attorney?

A power of attorney is a legal document that allows a person to appoint someone they trust in advance to make decisions for them if they become unable to make decisions for themselves. The person you appoint is known as your attorney.

Q2. When will I need one?

The need for a power of attorney which identifies your substitute decision-maker could arise because of an illness, accident or disability which may leave you unable to make financial or personal care decisions, temporarily or permanently. By making a power of attorney, you can decide in advance whom you want to designate to make decisions on your behalf.

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Q3. Am I legally required to make a power of attorney?

The law does not require anyone to make a power of attorney, however, it has always been a good idea to have one.

Q4. Is there a deadline for appointing a power of attorney?

There is no deadline.

Q5. I want my spouse to make decisions on my behalf if I become mentally incapable. Should I put this in a legal document?

Generally, your spouse or partner does not automatically have the legal right to make decisions on your behalf for property/financial matters. However, family members do have the right to provide consent to medical treatment where no power of attorney exists. Informal arrangements in other personal care decision-making often work very well. You may wish to make sure that there is no question about your spouse's right to be your substitute decision-maker. You can do this by making a power of attorney.

Q6. How do I prepare a power of attorney?

No specific form is required; however, the Office of the Public Guardian and Trustee of the Ministry of the Attorney General distributes a power of attorney kit. The kit contains forms for financial/property and personal care matters. These kits are also available at public libraries, MPP offices and legal clinics. This kit is available in a number of languages and alternative formats. You may also wish to consider other forms which may be available through lawyers and stationery stores etc.

Q7. Do I have to go to a lawyer to make a power of attorney?

No But you may wish to consult a lawyer Consulting with other expert advisors is also a good idea, provided they are impartial and concerned only with your best interests.

Q8. How can I be assured that my wishes will be carried out?

It is important that you appoint a person that you trust to make decisions on your behalf, and make this person aware of your wishes. The person you appoint as your attorney must follow the wishes that you express unless it is impossible to do so. Your power of attorney should be kept in a safe place and be easily accessible by the person you have appointed.

PROPERTY / FINANCE

Q1. Why do some people call a power of attorney for property/finances a "continuing" power of attorney?

A continuing power of attorney for property which authorizes someone you trust to manage your money and property if you become mentally incapable is "continuing" because it will remain valid after you become mentally incapable.

Q2. If I made a power of attorney for property/financial matters before proclamation of the Act, is it still valid?

Yes. If your power of attorney was valid prior to proclamation, it remains valid now

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Q3. I heard that under this law the person I appoint as my attorney will have to put up security and file a plan. Is this true?

No, it is not true.

Q4. What happens if I don't appoint someone to be my attorney for property/finances and I become incapable of managing my own affairs?

Your circumstances may not require a legal substitute decision-maker. If you do need one, under this law there are ways for a spouse, partner or relative to apply directly to the Office of the Public Guardian and Trustee to be appointed as your guardian. If you are at risk and no family member, partner or other supportive person is willing to come forward, the Public Guardian and Trustee may be required to act as your guardian.

PERSONAL CARE

Q1. What is a power of attorney for "personal care"?

A power of attorney for personal care authorizes the person you trust to make decisions about such things as where you live, what you eat, your health care, your safety, what you wear and your personal cleanliness if you become mentally incapable. It is important to note however, that a family member can make health care decisions even if you don't have power of attorney for personal care.

Q2. Why should I make a power of attorney for personal care?

You may want to give a specific person the legal authority to make your personal care decisions. Making a power of attorney for personal care allows you to appoint the person of your choice.

Q3. What is the difference between a "living will" and a power of attorney for personal care?

A power of attorney for personal care names a specific person(s) to be your decision-maker It can also include your wishes about your care, but this is not required. The law says that decisions made on behalf of a mentally incapable person must reflect the wishes expressed by that person while capable unless it is impossible to do so.

A "living will" is a written expression of your wishes about your care. It need not name a specific person to make decisions and it does not have to be signed and witnessed in any particular way. It must be followed by the person who becomes responsible for your decisions.

Q4. What happens if I don't make a power of attorney for personal care and I become mentally incapable?

It depends on your situation. If your needs are simple and there are no disputes about them, there may not be any reason to formally appoint a decision-maker. Friends and family often provide the necessary support. Decisions about health care do not require a formally appointed decision-maker. By law, a relative can make these decisions.

But sometimes disputes arise and informal supports are not enough. If this is the case, your family or a close friend can apply to the Court to be appointed as your guardian.

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Guardianship can only happen if a judge is satisfied that there is no other solution.

OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

Q1. What happens if I don't have family or friends to make decisions for me?

The Office of the Public Guardian and Trustee may apply for guardianship as a last resort when it is clear that a person is at risk and there is no one else willing or able to assume this responsibility.

Q2. What does the Office of the Public Guardian and Trustee do?

The Office is responsible for reviewing applications which are made by individuals for guardianship before these applications go to Court.

The Office is authorized to appoint someone to replace them as statutory guardian.

The Office also acts as financial guardian for mentally incapable people who have no one else to act for them.

The Office may also become the guardian for personal care decisions when there is a risk to the person and there is no other option.

Q3. I know that there are mentally incapable people who suffer terrible abuse or who neglect themselves to the point of serious illness or even death. Will the office do anything to solve this problem?

Yes. The *Substitute Decisions Act* corrected a very serious problem. Prior to the proclamation of this Act, there had been no public body responsible for protecting mentally incapable people who needed a guardian to stop or prevent abuse, neglect or exploitation.

Under the Act, the Public Guardian and Trustee must investigate reports of serious harm to mentally incapable adults. The Office will apply to Court for temporary guardianship if necessary to protect the person from harm.

These questions and answers cannot include every detail or answer every question. But they do provide you with general information about some of the provisions of the *Substitute Decisions Act*.

Call for power of attorney kits

For more detailed information on the Act or to obtain a power of attorney kit, write, call or fax:

Substitute Decisions Act Information
Office of the Public Guardian and Trustee
595 Bay Street,
Suite 800
Toronto, Ontario
M5G 2M6

Telephone: (416) 314-2800
Toll-free: 1-800-366-0335

Copies of the kits are also available in all public libraries, MPP offices and legal clinics.

Ontario

FACT SHEET

Office of the Public Guardian and Trustee

Amendments to the Substitute Decisions Act

General questions and answers about amendments to the *Substitute Decisions Act*.

Q1. Why did the government make changes to the *Substitute Decisions Act*?

A. Protecting the rights of mentally incapable people under the *Substitute Decisions Act* was more complicated and confusing than it needed to be. Changes have been made that will:

- increase accessibility;
- reduce complexity;
- reinforce the positive role of service providers and families; and
- restore the balance between the individual's right to control their own life and the need for protection of mentally incapable people.

Q2. What will the amendments do?

A. Amendments to the *Substitute Decisions Act* will:

- reduce the barriers to family members who apply to be appointed statutory guardians;
- broaden the categories of family members who can apply to become statutory guardians;
- simplify the rules for making and using powers of attorney; and
- clearly establish the government as substitute decision maker of last resort for people who have no one else to make decisions on their behalf.

Q3. Is it still important to make a power of attorney?

A. Yes. There will be fewer barriers for those wanting to make or use powers of attorneys. All Ontarians are urged to plan in advance and to appoint a trusted decision maker to act on their behalf if they should become mentally incapable.

Q4. Will the changes affect the power of attorney that I have now?

A. The amendments will not invalidate existing powers of attorney for property and personal care. People who made a valid power of attorney before the amendments are not required to make a new one.

Q5. Will the changes make the duties and powers of guardians and attorneys more complicated?

A. No. In fact, the duties and powers will be clearer.

Q6. How will these changes alter the way powers of attorney come into effect?

A. A power of attorney for *property* will continue to come into effect immediately unless it states otherwise. A power of attorney for *personal care* continues to come into effect when the person who granted it becomes mentally incapable. However, the process for using a power of attorney for

personal care will be much simpler because special validation procedures have been eliminated.

Q7. If I don't have a power of attorney, will I need one to keep the government out of my affairs?

A. Even if you don't make a power of attorney, it is unlikely the government would ever need to be involved. Changes to the law will ensure that family members and friends have priority over the government as substitute decision-maker. The Public Guardian and Trustee will only make decisions for people who have no one else to do so. However, it is a good idea to appoint someone you know and trust to make decisions on your behalf if you become incapable. Then your substitute decision-maker is the person of your choice.

Q8. How will it be easier for family members to become involved in substitute decision-making?

A. Previously, only immediate family members could apply to the Public Guardian and Trustee to obtain authority to make decisions about property matters on behalf of their mentally incapable relatives. Now any relative will be able to apply.

Q9. How will the role of the Public Guardian and Trustee change?

A. The new law will reinforce the Public Guardian and Trustee's role as substitute decision-maker of <u>last</u> resort. For example, private arrangements made in advance of incapacity override statutory guardianship so that the Public Guardian and Trustee will not become involved.

Q10. Will the Public Guardian and Trustee still investigate reports of abuse or neglect of vulnerable people?

A. Yes, however the new law will clarify what steps need to be taken in an investigation. This will allow the PGT to focus its efforts on the most serious cases of abuse and neglect. This will also reduce unnecessary government intrusion in private lives.

Q11. Before, a power of attorney for property was terminated in some cases if a person was found incapable. Will this change?

A. Yes, it will. If an individual makes a continuing power of attorney for property, appointing a substitute decision maker in the event of mental incapacity, that choice will be respected and a subsequent assessment that a person has become mentally incapable <u>will not</u> terminate the power of attorney.

Q12. When will these changes come into effect?

A. The *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act* came into effect on March 29, 1996.

For more information, contact the Office of the Public Guardian and Trustee at (416) 314-2800 or toll-free 1-800-366-0335.

10/96

Facts About the Consent and Capacity Board

The Consent and Capacity Board is an independent body created by the provincial government. It conducts hearings under the *Health Care Consent Act*, the *Mental Health Act* and the *Substitute Decisions Act*. Board members are either psychiatrists, lawyers or members of the general public. The board sits with one, three or five members. Hearings are recorded in case a transcript is required.

What matters may come before the Board?

The board has authority to hold hearings to deal with the following matters:

Health Care Consent Act

- Review of capacity to consent to a treatment, admission to a care facility or a personal assistance service.
- Consideration of the appointment of a representative to make decisions for an incapable person with respect to treatment, admission to a care facility or a personal assistance service.
- Consideration of a request to amend or terminate the appointment of a representative.
- Review of a decision to admit an incapable person to a hospital, psychiatric facility, nursing home or home for the aged for the purpose of treatment.
- Consideration of a request from a substitute decision maker for directions regarding wishes.
- Consideration of a request from a substitute decision maker for authority to depart from prior capable wishes.
- Review of a substitute decision maker's compliance with the rules for substitute decision making.

Mental Health Act

- Review of involuntary status (civil committal).
- Review as to whether a young person (aged 12 to 15) requires observation, care and treatment in a psychiatric facility.
- Review of incapacity to manage property.
- Review of competency to access or allow others to access the clinical record.
- Consideration of appointment of a representative for the purpose of disclosure or access to records.
- Consideration of a request from a psychiatric facility to withhold access to a clinical record.

Substitute Decisions Act

- Review of statutory guardianship for property.

How are applications made?

Application forms may be available from health or residential facilities. Completed applications should be faxed to the Board's regional office. Health practitioners and officials of health and residential facilities are expected to fax forms to the Board within one hour of completion. If necessary, call 1-800-461-2036 for application forms, specific information sheets and contact information for the Board.

When and where will the hearing be?

The parties will receive a notice from the Board with the time and place of the hearing. If you are not a party, you may ask the Board for the time and place. The hearing will usually take place within a week after the Board receives the application and will be held in the facility where the person who is the subject of the hearing resides or receives treatment or at some other place convenient to the parties.

How much does it cost?

There is no charge to the participants for the services of the Board. The Board is publicly funded and requests that all participants assist in keeping costs down.

What will happen at the hearing?

Each party may attend the hearing and invite anyone they want to come. Family members and friends are also encouraged to attend. The presiding member will introduce everyone and explain how the hearing will work, who the official parties are and the order in which people will speak.

Each party may have a lawyer, call witnesses and bring documents.

Each party and the Board members may ask questions of each witness.

At the end of the hearing, each party will be invited to summarize and the presiding member will then end the hearing.

What happens after the hearing?

The Board will meet in private to make its decision. The Board will issue its decision within one day. The Board may also issue written reasons explaining its decision. Written reasons will be issued if any of the parties request them. This request must be made within thirty days of the hearing.

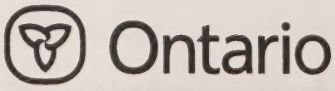
Can the Board's decision be appealed?

Any of the other parties may appeal the Board's decision to the General Division of the Ontario Court.

How can I get more information?

Further information sheets as well as application forms and detailed contact information for the regional and head offices of the Board can be obtained by calling **1-800-461-2036**.

Different rules apply to a hearing held to decide if a person is to be denied access to his or her own records in a psychiatric facility.



The Consent and Capacity Board
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